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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1519

CLARENCE RAMEY, JAMES BLEDSOE, DAVID CURTIS MINTON, CHESTER FUGATE, HERSCHEL WOODWARD, ONZA COLLIER, DANNY MOORE, RONNIE FORTNER, JAMES HENSLEY, MURIEL GIBBONS, JAMES HAMILTON, AND MARION HOBBS,

Petitioners,

v.

PAUL T. HARBER, Individually, and as Sheriff of Lee County, Virginia; COUNTY OF LEE, VIRGINIA; AND BOARD OF SUPERVISORS OF LEE COUNTY, VIRGINIA,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The question presented by this case is whether the Court of Appeals correctly held that this Court's decision in *Elrod* v. *Burns,* 427 U.S. 347 (1976), should

not be given retroactive effect, where the Court of Appeals applied the guidelines of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), in determining the retroactivity issue. The respondents submit that the Court of Appeals did not reject the District Court's findings of fact, but to the contrary, based its holding on such findings.

STATEMENT OF THE CASE

This is a political patronage case, arising from *Elrod* v. *Burns*, 427 U.S. 347 (1976), in which a purality of this Court decided that a "nonpolicy making, nonconfidential government employee [cannot] be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs." Concurring opinion of Mr. Justice Stewart, 427 U.S. at 375.

Lee County, Virginia, is a small rural county in the extreme southwestern portion of the State. Its people are engaged primarily in agriculture and coal mining. The county has a history of spirited partisan political battles. Unlike the rest of the South generally, the two major parties have been of relative equal strength over the years, with the Democrats winning one election and the Republicans the next.

In Virginia, one of the locally-elected offices is that of sheriff. The sheriff is a so-called "constitutional" officer, meaning that his election by the people is provided for in the Constitution of Virginia. Va. Const. art. VII §3 (1971). A sheriff holds office for a term of four years and in the November, 1975, general election, the incumbent sheriff, Curtis Flannery, a Republican, was opposed by Paul T. Harber, a former coal miner and Democrat. Sheriff Flannery's deputies worked for the reelection of their employer, and they

knew that they could expect not to be reappointed if Harber was elected since he would select his own deputies and would doubtless select from those who had supported his candidacy and in any event would not select his deputies from those who had opposed him. Sheriff Flannery's deputies had good reason to know of this practice since they in fact had obtained their jobs the same way when Sheriff Flannery had been elected. Sheriff Flannery had been elected four years previously and when he had assumed office he had hired a totally new set of deputies, retaining none of the deputies who had served under his predecessor, a Democrat.

After his election in November, Sheriff Harber gave out application forms to persons interested in becoming deputy sheriffs and out of some fifty applicants, selected ten deputies. Only one of Sheriff Flannery's deputies made formal application, although the District Court found as a matter of fact that they had "expressed interest" in continued employment but felt that making formal application would have been futile. Opinion of District Court, Appendix C to Petition, page 21a.

Sheriff Harber took office with his new deputies on January 1, 1976. On June 28, 1976, this Court decided *Elrod* v. *Burns*, and on September 22, 1976, Flannery's deputies filed suit against Sheriff Harber as well as the governing body of Lee County for "injunctive and declaratory relief" alleging that the failure to reappoint the plaintiffs as deputy sheriffs was a violation of the Constitution. They sought as relief "permanent reinstatement" in their "former employment position" as well as a sum of money equal to their back pay, and attorney's fees. The District Court

denied a preliminary injunction, but granted an expedited trial on the merits which took place January 26-28, 1977. The District Court dismissed the action as to the governing body of Lee County, but in an opinion filed April 21, 1977, held that Sheriff Harber's hiring of his own deputies violated the Constitution. Sheriff Harber was directed to hire the Flannery deputies as his own. Because the District Court found that Sheriff Harber had understandably relied on existing practice in all of his actions, it declined to direct him to pay the Flannery deputies back wages.

After an appeal by Sheriff Harber had been noted and a cross-appeal by the Flannery deputies to the decision of the District Court not to permit back wages, the Flannery deputies filed a second action against Lee County and its governing body seeking payment from the county treasury of the Flannery deputies' back wages. The District Court granted summary judgment in that case, on the basis of its earlier decision.

After oral argument, the Court of Appeals reversed, holding that even were *Elrod* v. *Burns* to be applied to the unique facts of this case, it should not be held to apply retroactively, in light of the guidelines laid down by this Court in *Cheveron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

This case does not present a suitable occasion for the exercise of the Court's discretion to review. The Court of Appeals properly decided, based on the findings of the District Court, that retroactive application of the rule of *Elrod* v. *Burns* would not be

proper. That determination was made by correctly applying rules announced by this Court. The Court of Appeals below is the first such court to expressly determine this issue since *Elrod*, and there is thus no division among the circuits in this regard. Indeed, the issue has received scant attention in the lower federal courts. This is undoubtedly true because the issue is not a significant one and will not likely reoccur. The Court of Appeals' decision fairly and equitably balanced the benefits and hardships imposed by the application of any new constitutional rule.

I

The Court Of Appeals Correctly Determined That *Elrod* v. *Burns* Was Not To Be Applied Retroactively.

The Court of Appeals assumed, at least for the purposes of its decision, that the principles announced in *Elrod* v. *Burns*, 427 U.S. 347 (1976), applied to the facts of the case. Opinion of Court of Appeals, Appendix A to Petition, page 9a. It disagreed with the District Court, however, as to the issue of retroactivity.

In determining that issue the Court of Appeals looked to the guidelines of this Court as set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The Court of Appeals' primary disagreement with the district court was in its interpretation of whether the holding in *Elrod* was a substantial change in the law—the first of the criteria to be used in determining the retroactivity issue. See *Chevron Oil Co.* v. *Huson*, 404 U.S. at 106. The Court of Appeals noted that the dissenters in *Elrod* in this Court had pointed out the break with prior law which it represented, with the

Chief Justice describing the holding as "run[ning] counter to longstanding practices that are part of the fabric of our democratic system ... " [427 U.S. at 375] and Mr. Justice Powell writing that the majority was holding unconstitutional "a practice as old as the Republic ... " [427 U.S. at 376].

In addition, the Court of Appeals held that past precedent in the Fourth Circuit was directly to the contrary of *Elrod.* In *Nunnery* v. *Barber,* 503 F.2d 1349 (4th Cir. 1974), *cert. denied,* 420 U.S. 1005 (1975), the Court of Appeals expressly upheld a patronage discharge against attack on constitutional grounds. The plaintiff in *Nunnery* was a former manager of a state operated liquor store in West Virginia who had been discharged from her employment for patronage reasons. The Court found no constitutional infirmity in that system. Judge Russell, speaking for Court of Appeals, reviewed the history of judicial consideration of patronage:

> The plaintiff's action represents a challenge to the "patronage" or "spoils" system of public employment. Such an attack is not novel. For more than a century, the system has been under attack. Generally the attack has been directed toward legislative action as the proper source of relief. And both federal and state governments have responded with civil service laws providing a merit system for public employment and giving public employees in certain classifications protection against discharge for patronage reasons .... When however, resort has been had by public employees to the courts for relief independently of the legislated civil service laws or regulations ... the claim has received scant consideration; and this has been true whether the claim was premised on the constitutional right of free speech, equal protection or due process.

503 F.2d at 1351.

The Court of Appeals announced its *Nunnery* decision on September 18, 1974, less than two years before *Elrod.* In between the two decisions, Sheriff Harber took office. As the Court of Appeals held, if it could not anticipate *Elrod,* it is not unreasonable that Sheriff Harber could not. Opinion of Court of Appeals, Appendix A to Petition, page 13a.

This holding by the Court of Appeals was not contrary to any finding of fact by the District Court. While there was no evidence that Sheriff Harber, a former coal miner, acted after an examination of case law, the District Court clearly found that his actions were consistent with his understanding of permissible political practice. Opinion of District Court, Appendix C to Petition, page 42a.

The petitioners' contention that *New York* v. *Cathedral Academy,* 434 U.S. 125 (1977), required the Court of Appeals to defer to the Distict Court's decision on retroactivity, is without merit. In *Cathedral Academy,* this Court held only that it was a matter for the federal courts and not a state legislature to decide if the "unique flexibility of equity" permitted retrospective application of a constitutional rule. The Court of Appeals accepted the factual findings of the District Court and did not reject them. That it came to a different conclusion based upon those findings is not a ground for attack on its decision.

II

This Case Presents No Significant Issue For Review By The Court, In That There Has Been Little Attention Given To The Question And It Is Unlikely To Reoccur.

The question of the retroactive application of *Elrod* v. *Burns* has received little attention in the federal courts. Other than the two opinions below, only two other reported decisions, both by Pennsylvania district courts, have concerned themselves with the retroactive application of *Elrod.* Those two courts were divided on the issue. *Retail Clerks Ass'n* v. *Leonard,* 450 F.Supp. 663 (E.D. Pa. 1978); *Litwhiler* v. *Hidlay,* 429 F.Supp. 984 (M.D. Pa. 1977). In view of the fact that applicable statutes of limitation have or will shortly foreclose all but pending causes of action arising prior to *Elrod,* it is unlikely that the question will receive more attention in the future than it has in the past.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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